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CONGRESS AND THE WAR POWERS

THOMAS F. EAGLETON*

On almost every issue, our current national soul-searching leads us back to one crucial question whose answer is increasingly in doubt: Can the institutions created almost 200 years ago to govern a rural and agricultural nation meet the need of an urban, twentieth-century, technological society?

Much of the turmoil and questioning has sprung from our Vietnam experience. Even today, as we poke through the historical debris of the Vietnam era, it is difficult to identify why, and by what authority, the decisions were made which so deeply committed us in Southeast Asia. And the most significant question for the future to emerge from our Vietnam era is this: Who decides when and where America goes to war?

The President claims inherent rights as Commander-in-Chief. Congress claims that the Executive has usurped its war-making authority. Although it has the means to reclaim its authority, Congress has failed to act. In the past, both Legislature and Executive have been unwilling to have a showdown on this delicate issue in times of peace, and unable to in times of war. Yet this debate goes to the very heart of our system of government. It raises basic questions that must be answered. Will checks and balances still work in a hair-trigger nuclear age? Have we given up the benefits of collective judgment out of necessity or out of neglect? What follows is an effort to set forth the present state of the question and to argue that an orderly balance of power in war-making matters can and must be restored.

I. THE CONSTITUTION AND ITS UNDERLYING PRINCIPLES

During the debate on Indochina, the 91st Congress saw an unprecedented outpouring of commentary on the meaning of the Constitution and the thinking of the men who wrote it. Learned articles have appeared

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in many of our law reviews.¹ Law books were searched for both ancient and modern judicial opinions.² Treatises of recognized constitutional scholars were read and reread, and members of Congress³ renewed their own acquaintance with the writings of Hamilton, Madison, Jay and Jefferson⁴—all in an attempt to understand the directives of the Constitution on the way we go to war. But to comprehend these directives some 183 years after they were written, it is necessary first to distill the principles on which the Constitution rests.

It is clear that the men who wrote the Constitution were influenced not only by the writing of theoreticians like Locke and Montesquieu, but also by the governmental practices and procedures which were followed or, in some instances, merely preached, in England. They noted on numerous occasions that many of their ideas had been derived "from the nation from whom the inhabitants of these states have in general sprung."⁵

In formulating a Constitution to create a central government of enormous but not unlimited powers, our Founding Fathers therefore worked from certain basic premises. First, since all of them were familiar with the autocratic powers which had been exercised over the colonies by the King of England, the Founding Fathers were reluctant to grant too much authority to the Chief Executive. They did not want this country's President to possess a variety of powers in the absence of any collective judgment. But neither did they want him completely stripped of discretion, at the mercy of other branches of the central government. So they limited his discretionary powers within rather narrow guidelines subject to legislative check lest the wisdom of a single man—or lack thereof—carry this country too far down a selected path.

Second, as a corollary to this concern, the Founding Fathers believed that the legislature should possess the widest range of authority delegated to the central government. A bicameral Congress composed of diverse individuals would reach its decisions through a process of deliberation and thus provide a collective judgment. It was not without forethought that Hamilton conceded "the superior weight and influence of the legislative body in a free government . . ."⁶ The framers of the Constitution rested their primary hopes for thoughtful policymaking on Congress, with its most cumbersome and therefore deliberative decision-making process. Congress

1. See, e.g., 116 CONG. REC. 8737 (daily ed. June 10, 1970) where Senator Church made reference to the article *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

2. See, e.g., *Bas v. Tingy*, 4 U.S. (4 Dall.) 36 (1800); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970).

3. See, e.g., the excellent analysis of Senator William Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. RICH. L. REV. 1 (1971).

4. E.g., THE FEDERALIST (A. Hamilton, J. Madison, J. Jay).

5. THE FEDERALIST No. 26 at 214 (B. Wright ed. 1961) (A. Hamilton).

6. THE FEDERALIST No. 73, at 470 (B. Wright ed. 1961) (A. Hamilton).

received not only the longest list of powers, but also the residuary authority:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.⁷

Third, the framers of the Constitution were aware that, by giving specific and residual powers to the Congress while providing the President with a somewhat undefined charter, they had created a system of concurrent authority. They did not doubt that in so doing they had sowed the seeds for possible conflict. It was assumed that if this conflict occurred, compromise should be sought at all costs. However, if inter-institutional negotiations proved fruitless, it was likewise clear that overriding control would remain with the Congress. It was Hamilton—the chief architect of executive branch power—who wrote:

The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions.⁸

A Congress moving to reverse the policies of a President should step carefully, but step it could. Collective decision-making—under the Constitution—was to be given more weight than one man's judgment. Antecedent presidential action could be overruled by the collective will of the legislature.

II. APPLICATION OF BASIC PRINCIPLES TO THE WAR-MAKING POWER

Obviously the consequences of applying these underlying principles appear throughout the Constitution. But nowhere are they more evident than in the treatment given to the war-making powers. The framers of the Constitution directed a great deal of time and attention to the process by which this country should engage in hostilities. While most issues are dealt with by the Constitution in one reference, the question of waging war and raising military forces is treated throughout that document:

Article I, section 3 gives the Congress power to "declare war," grant "Letters of Marque," order "Reprisals," "raise and support Armies" (but for no longer than two years at a time), "provide and maintain a Navy," make rules which will regulate and govern the military forces, and provide for organizing the militia and calling it up so that insurrections can be suppressed and invasions repelled.

Article I, section 10 forbids the States—absent congressional consent—from keeping military forces in time of peace or from engaging "in War,

7. U.S. CONST. art I, § 8.

8. 7 WORKS OF ALEXANDER HAMILTON 83 (J. Hamilton ed. 1851).

unless actually invaded, or in such imminent danger as will not admit delay."

Article II, section 2 makes the President "Commander-in-Chief of the Armed Forces as well as the State Militia, when it is called into service for use by the federal government."

Article IV, section 4 provides that the central government shall guarantee "a Republican Form of Government" to every state and "shall protect each of them against invasion."

These provisions were not designed to provide definitive answers to all questions regarding the use of American troops or the appropriate responses to acts of war or hostility by foreign nations. Rather, they were structured so that the Congress, the Chief Executive, and the States might understand how they were to mesh their roles in protecting this Nation from external harm.

In short, the Constitution attempted to assure that the awesome consequences of war did not flow through chance or mistake. The Founding Fathers set basic ground rules to control what they euphemistically referred to as "the Dog of War."⁹ The ground rules themselves were relatively simple.

First, the framers drew a crucial distinction between offensive and defensive hostilities. If the United States were attacked, the President would act to repel the attack. Congress could provide the President with a small standing Army and Navy to fulfill his functions as defender of the nation's integrity—although in the early years of our nation such a course was admittedly frowned upon. The states could maintain militia and Congress could establish procedures under which the President might nationalize them rapidly to meet foreign attacks.

Second, Congress was to decide whether defensive action was to be supplemented or replaced by offensive action. The time lost in this process was considered less important than the necessity that the nation's elected representatives express their collective judgment. Thus, the Congress was to sanction in advance whatever actions were taken, whether simple reprisals, complex military operations or all-out war.

Third, the President's only role in the war-making process was to direct operations. That Congress was to play no part in day-to-day tactics was made clear by the draftsmen of the Constitution who changed the term "make war"—which might imply the idea of Congress conducting hostilities, to "declare war"—which carried the connotation of congressional initiation but presidential direction.¹⁰

The exact role of the President as Commander-in-Chief was clarified both by the delegates to the Constitutional Convention and by the authors

9. 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed. 1955).

10. J. MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 475 (1966).

of *The Federalist*. The records make clear the delegates' surprise when the possibility of giving the President power to make decisions which might result in offensive military action was raised at the Constitutional Convention. One delegate commented that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."¹¹ This statement simply reflected the sentiment that centralized decision-making on matters of consequence was to be avoided. As Hamilton noted in a slightly different context:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.¹²

Clearly, the title "Commander-in-Chief" did not carry with it war-initiating powers and, in the words of *The Federalist*, No. 69, to be Commander-in-Chief

would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.¹³

While the President's role as policy-maker on questions of war was minimized, he was in turn granted far greater authority in day-to-day military affairs once hostilities had been commenced. As Hamilton stated:

The direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.¹⁴

Fourth, commencement of hostilities was not intended to end congressional responsibility. For although Congress was not to be involved in making particular tactical decisions, it still was to play an important role in policymaking. A change from defensive to offensive action would need legislative approval. Decisions involving major changes in tactics—changes which might bring new opponents into a war, for example—also would constitute an appropriate subject for congressional concern.

11. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 318 (rev. ed. 1937).

12. *THE FEDERALIST* No. 75, at 477 (B. Wright ed. 1961) (A. Hamilton).

13. *THE FEDERALIST* No. 69, at 446 (B. Wright ed. 1961) (A. Hamilton).

14. *THE FEDERALIST* No. 74, at 473 (B. Wright ed. 1961) (A. Hamilton).

That Congress could authorize less than total war was recognized by all three branches of the federal government early in our history. The early application of the Constitution's provisions dealing with war-making and the use of American military forces takes on special significance since most of the decisions and writings were the product of men who had either participated in drafting the Constitution or were intimately familiar with the context of its provisions.

In 1798, due to a number of French actions against American shipping, the United States became embroiled in its first trial by arms. Refusing to take independent action to initiate hostilities with the French, President John Adams waited until the Congress had passed a variety of statutes¹⁵ suspending commercial relations with France and authorizing American vessels to seize certain French ships as well as other ships trading with the French. Thus, it was Congress which originated and limited our first combat response to hostile action by a foreign power.

This naval struggle with France produced, in turn, a series of judicial decisions by our Supreme Court which illuminated the principles underlying the Constitution's war-making provisions. In *Bas v. Tingy*,¹⁶ the Court held that Congress could declare war in either of two ways—as a public or perfect war or as a limited or imperfect war. Justice Washington stated:

If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation, and *all* the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations, more confined in its nature and extent being limited as to places, persons, and things; and this is more properly termed *imperfect war*, because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is *public war*, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrain the general power.¹⁷

The limited naval actions of 1798, according to Justice Washington, constituted "war of the imperfect kind, . . . more properly called acts of

15. Act of July 9, 1798, ch. 68, 1 Stat. 578; Act of May 28, 1798, ch. 48, 1 Stat. 561.

16. 4 U.S. (4 Dall.) 37 (1800).

17. *Id.* at 40 (emphasis added).

hostility or reprisal" and were well within the constitutional power of Congress to declare.¹⁸ Justice Chase, concurring, stated that Congress had taken the permissible route of declaring "hostilities . . . by certain persons in certain cases." He noted further that such deliberate action "only proves the circumspection and prudence of the legislature."¹⁹

Justice Patterson, concurring in this unanimous sanctioning of Congress' power to declare a war limited in time or scope or area, stated:

As far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations . . . [It] is, therefore, a public war between the two nations qualified, on our part, in the manner prescribed by the constitutional organ of our country.²⁰

As the *Bas* case should be interpreted as delineating the range of congressional powers to declare and circumscribe hostilities, *Talbot v. Seeman*²¹ should be read as putting the Court on record as to which branch of government must bear the *sole* responsibility for taking this country into hostilities—whether limited or full scale. It was newly appointed Chief Justice John Marshall who wrote:

The *whole powers* of war being, by the constitution of the United States, vested in congress, the *acts of that body can alone* be resorted to as our guides in this inquiry. It is not denied, nor, in the course of the argument has it been denied, that *congress may authorize general hostilities*, in which case the general laws of war apply to our situation; or *partial hostilities*, in which case the laws of war, so far as they actually apply to our situation, must be noticed.²²

Three years later, in *Little v. Barreme*,²³ Marshall expounded further on the constitutional structuring of the war-making powers. In 1799 Congress had authorized the seizure of American ships bound *for* French ports. The *Little* case involved the seizure of a vessel which had been taken enroute *from* a French port to the Danish Island of St. Thomas. In a short opinion, Marshall ruled that the seizure was in conflict with the congressional will and therefore illegal. The Chief Justice stressed that had Congress simply declared a naval war against the French, the President as "Commander-in-Chief of the armies and navies . . . might, without any special authority for that purpose" have had power to seize an American ship bound *from* France.²⁴ By sanctioning only the seizure of American ships

18. *Id.*

19. *Id.* at 43-45.

20. *Id.* at 45-46.

21. 5 U.S. (1 Cranch) 1 (1801).

22. *Id.* at 28 (emphasis added).

23. 6 U.S. (2 Cranch) 170 (1804).

24. *Id.* at 177.

to France, Congress had effectively pre-empted presidential discretion and "prescribed that the manner in which this law shall be carried into execution . . . exclude[s] a seizure of any vessel not bound to a French port."²⁵

Thus, through these three early decisions, the Supreme Court set forth a solid underpinning for later interpretations of the war-making powers. To the Court, "[t]he whole powers" of entering into an offensive war were vested in the Congress "alone."²⁶ Included in these powers was authority to declare either general or narrowly limited hostilities. Presidential authority to take offensive action under the guise of the Commander-in-Chief power arose only after Congress had acted. Moreover, while the tactics of warfare might require that the President have certain discretionary powers, even these powers could be narrowed by precedent legislative action.²⁷

This interpretation of the constitutionally prescribed dichotomy regarding the war-making powers was not held by the High Court alone. Such diverse personalities as Jefferson, Hamilton, Adams, and Madison all agreed that presidential authority to take offensive action as Commander-in-Chief existed only after Congress had acted, and even then these powers could be narrowed by precedent legislative action. But they realized that strong-willed Presidents, exercising their commander-in-chief powers, might show great reluctance in returning to Congress for further approval of new decisions once hostilities had begun. Powerful presidents would naturally interpret policy decisions to be tactical. The Founding Fathers responded to this dilemma by giving the Congress full power over the expenditure of funds for the military and insisting that such funds be reviewed at least every two years. As *The Federalist No. 24* noted:

The whole power of raising armies was lodged in the *Legislature* . . . [subject to] an important qualification . . . which forbids the appropriation of money for the support of an army for any longer period than two years—a precaution which, upon a nearer view of it, will appear to be a great and real security against the keeping up of troops without evident necessity.²⁸

The Founding Fathers hoped that Congress would not turn on the Commander-in-Chief once hostilities had begun and force him to alter his course. But they recalled that such action had been taken by English Parliaments against wilful kings²⁹ and, as unpleasant as the prospect was,

25. *Id.* at 177-78.

26. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

27. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

28. *THE FEDERALIST* No. 24, at 204 (B. Wright ed. 1961) (A. Hamilton.)

29. By 1789, in England, Parliament was the dominant force in military affairs. In fact, it had been so since the early years of the seventeenth century; no king had been able to wage a war without parliamentary consent since 1626. In that year, when Charles I tried to wage a war without parliamentary consent, Parliament voted him no money. The impossibility of continuing the war without

they recognized that similar action might be required by Congresses faced with strong and militant Presidents.

III. THE PRINCIPLES IN PRACTICE

The set language of the Constitution and its underlying principles have been subjected to 183 years of practice. Unfortunately precedents have occurred which prevent a conclusive argument that these principles are still in effect.

In recent congressional debate much was made of the fact that at least 125 instances can be cited where Presidents have sent military units into hostilities at their own discretion.³⁰ Most of these actions have been relatively trivial, some having the *post facto* sanction of Congress: rescuing American citizens abroad in times of disorder or revolution, protecting commerce against piracy, and other miscellaneous policing operations such as the Boxer Rebellion in China. But some of these cases must be viewed as clear abuses of executive power. One such abuse occurred when President Polk sent American troops to occupy the disputed border territory with Mexico, provoking a clash in which 11 Americans were killed. However, Polk's action was not unnoticed and by a vote of 85-81 the House of Representatives denounced it as a war unnecessarily and unconstitutionally begun by the President of the United States.³¹

With a few exceptions, however, the constitutional separation of powers remained pretty much intact until the turn of the century. In the 20th century the President's war-making powers rapidly expanded with Teddy Roosevelt's intervention in Panama and Wilson's excursions into Mexico.

President Franklin Roosevelt took extraordinary powers upon himself as he prepared for World War II. First, he conveyed 50 destroyers to England, under his powers as Commander-in-Chief. Then, through convoys to England and a shoot-on-sight doctrine, Roosevelt in effect committed the United States to war with Germany.

During the war the President expanded his powers even further when opposing certain measures of the Emergency Price Control Act as inflationary. He threatened the Congress bluntly when he declared:

In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.

At the same time that fair prices are stabilized, wages can and will be stabilized also. This I will do.

parliamentary financing led Charles to sign the Petition of Right (1628) which declared it illegal to collect any taxes without parliamentary consent, thus ending forever the possibility of a king waging wars independent of parliamentary authorization.

30. See, e.g., 117 CONG. REC. 5640-46 (daily ed. April 26, 1971) (remarks of Senator Goldwater).

31. CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848).

The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war

When the war is won, the powers under which I act automatically revert to the people—to whom they belong.³²

If a President can put us into war and then successfully claim unlimited presidential power in wartime it could easily provide a precedent for the destruction of our constitutional government.

At the end of World War II public opinion strongly favored collective security—a concert of great powers enforcing peace by joint action against any future Hitler through the Charter of the United Nations. But Congress by no means relinquished its war power by consenting to ratify the United Nations Charter. Several weeks after the United Nations Charter became operative the United Nations Participations Act was passed by the Congress. Section 6 of that act empowered the President to negotiate a military agreement or agreements with the United Nations Security Council to make American forces available for United Nations' peace-keeping purposes. This was no blank check, however, for such agreements were "subject to the approval of Congress by appropriate Act or joint resolution."³³ The Participation Act also stated:

Nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council . . . armed forces, facilities, or assistance in addition to the forces, facilities and assistance provided for in such special agreement or agreements.³⁴

Only once have American armed forces been committed to full-scale combat on the basis of a decision made unilaterally by the President. That instance was Korea.

Although emergency conditions clearly existed after the North Korean invasion of South Korea, and the United Nations Security Council passed an "authorizing resolution" after United States air and naval forces were committed,³⁵ President Truman's action must be viewed as a sharp incursion into congressional war-initiating power. Congress never delegated power to the Security Council to commit American soldiers to hostilities under the United Nations Charter. Congressional leaders were informed "on the events and decisions of the past few days" but not asked to assent

32. See generally E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 304 (3d ed. 1948).

33. United Nations Participation Act, 22 U.S.C. § 287 (d) (1970).

34. *Id.*

35. See Hoyt, *The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy Making*, 55 AM. J. INT'L L. 45 (1961).

to those decisions.³⁶ However noble the motivation, this stands as a solitary case in our history, and it represents a precedent which must never happen again.

President Truman declared, through the *Department of State Bulletin*, that "[t]he President as Commander-in-Chief of the armed forces of the United States, has full control over the use thereof."³⁷ The *Bulletin* went on to claim a "traditional power of the President to use the armed forces of the United States without consulting Congress."³⁸ Obviously, this was a bold claim to "inherent" or "traditional" presidential power—which undermines the whole concept of constitutional government through a written Constitution.

Whereas President Eisenhower tended to acquiesce to the constitutional powers of Congress, John Kennedy tended to take the broadest of all possible views regarding presidential powers. On the eve of the Cuban crisis, President Kennedy sent to Congress a draft resolution stating that "the President of the United States is supported in his determination and *possesses all necessary authority*" to act.³⁹ According to the Chief Executive and Commander-in-Chief, this authority encompassed the use of the armed forces of the United States

to prevent the Castro regime from "exporting its aggressive purposes" to any part of the hemisphere . . . and to prevent the creation or use of any "externally supported offensive military base" in Cuba.⁴⁰

Congress balked. Senator Richard Russell and others would not stand for such a resolution. In Russell's words, it was "a clear delegation of the Congressional power to declare war."⁴¹ Senator Russell concluded:

I feel very strongly it is preferable to say he was authorized (by Congress) instead of that he possesses all the necessary authority.⁴²

In its final form, the resolution did not confer authority on the President, but rather served simply as a statement of national policy.⁴³

36. President Truman ordered American air and sea forces to give Korean Government troops cover and support on June 26, 1950. The President sent a message to Congress on July 19, 1950: *The Korean Situation: Its Significance to the People of the United States*, 23 DEP'T STATE BULL. 163 (1950).

37. U.S. Dept of State, *Authority of the President to Repel the Attack in Korea*, 23 DEP'T STATE BULL. 173 (1950).

38. *Id.* at 174.

39. S. Con. Res. 92, 87th Cong., 2d Sess., 108 CONG. REC. 19,528 (1962).

40. *Id.*

41. *Hearings on S. Con. Res. 92 Before the Senate Comm. on Foreign Relations and the Senate Comm. on Armed Services*, 87th Cong., 2d Sess. 35 (1962).

42. *Id.* at 36.

43. Cuban Resolution, Pub. L. No. 87-733, 76 Stat. 697 (1962).

IV. THE WAR IN INDOCHINA AND THE CONSTITUTIONAL QUESTIONS WHICH SURROUND IT

An account of this country's war-making efforts obviously cannot be complete without including the present hostilities in Indochina. No war in our history has troubled the nation more, and no war has posed more difficult constitutional questions.

United States' military involvement in Indochina dates back to 1955, when President Eisenhower established a military advisory group of approximately 350 persons in South Vietnam, although almost one billion dollars in aid had been accorded the French since 1950. By the time Eisenhower left office, the United States' military group had more than doubled. Under President Kennedy, the number of American military advisors in South Vietnam continued to grow steadily. At the time of President Kennedy's death in 1963, the American commitment to that country had grown to 18,000 men, and their functions had broadened. They trained South Vietnamese troops and coordinated their military activities as well. They accompanied local forces on forays and advised them how to fight the Viet Cong. While these various American quasi-military activities were never kept secret, neither were they put before Congress for its specific approval.

Congress did not really seem to mind this arguable incursion into its powers and, in fact, continued to appropriate monies to support these actions in Vietnam. After all, the conflict was not going too badly. It was not inordinately expensive, and, in line with the new Kennedy doctrine of "flexible response," it constituted our first experiment in limited war-making and in the training of foreign forces to participate in the worldwide struggle against international communism.

Unfortunately for military strategists, amateur counter-revolutionaries, and quiescent politicians, increasing communist activity and the coming 1964 presidential elections made Vietnam a front-page story. Then came the Gulf of Tonkin. In August 1964, American warships were allegedly attacked on two separate occasions by North Vietnamese patrol boats. After the second alleged attack, President Johnson ordered air strikes against North Vietnam's mainland—aimed at knocking out not only patrol boats, but also naval bases and petroleum storage depots as well. These were reprisals neither proportionate to, nor fully justified by, the attacks which were alleged to have occurred.⁴⁴ Again, Congress was not consulted before the response, and again Congress took very little note of this incursion into its constitutional powers.

On the following day, however, the President did present Congress with certain facts regarding the Tonkin Gulf incident. He asked both Houses

44. See generally the material referring to the Gulf of Tonkin incident in the chapter *Military Pressures Against North Vietnam*, in 4 U.S. DEP'T OF DEFENSE, UNITED STATES-VIETNAM RELATIONS 1945-1967 (Comm. Print 1971):

for their complete support through passage of the Tonkin Gulf Resolution. Both Houses responded rapidly and passed this vaguely worded and ill-defined resolution in its original presidential form with only two dissenting votes—Senators Wayne Morse and Ernest Gruening.⁴⁵

In perhaps his finest hour, Senator Morse attempted to persuade Congress that it must not grant the President this broad “predated declaration of war.” The resolution stated (in part):

[T]he Congress approves and supports the determination of the President, as Commander in Chief, to *take all necessary* measures to repel any armed attack against the forces of the United States and to prevent further aggression.

The United States regards as vital to its national interest and to world peace the maintenance of international *peace and security in southeast Asia*. Consonant with the Constitution and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, *as the President determines*, to take *all necessary* steps, including the use of armed force, to assist *any member or protocol state* of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

*This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured . . .*⁴⁶

Despite anguished protestations in retrospect, it seems clear that Congress knew what power it was delegating to the President at the time it passed the Tonkin Gulf Resolution. The record shows not only the warnings of Senators Morse and Gruening, but also a debate containing the following colloquy between Senator Fulbright, Chairman of the Foreign Relations Committee and floor manager for the Resolution, and Senator Brewster:

Mr. Brewster. I had the opportunity to see warfare not so very far from this area, and it was very mean. I would look with great dismay on a situation involving the landing of large land armies on the continent of Asia. So my question is whether there is anything in the resolution which would authorize or recommend or approve the landing of large American armies in Vietnam or in China.

Mr. Fulbright. There is nothing in the resolution, as I read it, that contemplates it. I agree with the Senator that that is the last thing we would want to do. *However, the language of the resolution would not prevent it. It would authorize whatever the Com-*

45. Vietnam Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), *repealed by* Pub. L. No. 91-672, § 12 (Jan. 12, 1971).

46. Vietnam Resolution, Pub. L. No. 88-408, §§ 2-3, 78 Stat. 384 (1964) (emphasis added).

mander in Chief feels is necessary. It does not restrain the Executive from doing it. Whether or not that should ever be done is a matter of wisdom under the circumstances that exist at the particular time it is contemplated. This kind of question should more properly be addressed to the Chairman of the Armed Services Committee. Speaking for my own committee, everyone I have heard has said that the last thing we want to do is to become involved in a land war in Asia; that our power is sea and air, and that this is what we hope will deter the Chinese Communists and the North Vietnamese from spreading the war. That is what is contemplated. The resolution does not prohibit that, or any other kind of activity.⁴⁷

Later that day, Senator Fulbright and Senator John Sherman Cooper discussed the meaning of the Resolution:

Mr. Cooper: *Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?*

Mr. Fulbright: *That is the way I would interpret it.* If a situation later developed in which we thought the approval should be withdrawn, it could be withdrawn by concurrent resolution.⁴⁸

It seems certain that in 1964 no member of Congress thought that within a year American planes would be running daily bomb runs over North Vietnam, even though the "Pentagon Papers" indicate that plans had been drafted by the Executive,⁴⁹ or that thousands of American troops would be engaged in "search and destroy" missions in South Vietnam's Delta region or constructing American base camps throughout that country. Despite his contingency plans President Johnson probably had no idea that the limited military operation in South Vietnam would soon blossom into a 30 billion dollar-a-year war.

Faulty vision and political pressures cannot be permitted to minimize the legal significance of the Tonkin Gulf Resolution. In my judgment, the Tonkin Gulf Resolution—pared of its verbiage and placed in the context of its legislative history—was a broad congressional charter to the President to combat North Vietnamese forces anywhere in the SEATO area. It was an extremely broad delegation of authority in the area of foreign affairs but, as the Supreme Court noted in *Zemel v. Rusk*,⁵⁰ Congress has always been permitted to grant extensive powers in foreign affairs

47. 110 CONG. REC. 18,403-04 (1964) (emphasis added).

48. *Id.* at 18,409 (emphasis added).

49. The authorization for contingency preparations was published in March, 1964. See generally the chapter *Military Pressures Against North Vietnam*, in 4 U.S. DEPT. OF DEFENSE, UNITED STATES-VIETNAM RELATIONS 1945-1967 (Comm. Print 1971).

50. 381 U.S. 1 (1965).

and to "paint with a brush broader than that it customarily wields in domestic areas."⁵¹ Although the existence of the Tonkin Gulf Resolution did not make the war we have waged in South Vietnam any wiser or any more explicable, it did make it a *legitimate* war authorized by the Congress.

This authorization has been revoked by the 91st Congress⁵²—in fact, the Senate repealed it twice.⁵³ The President agreed, signing the repeal into law. But the repeal of the Gulf of Tonkin Resolution has done nothing to change the course of the war or to reassert congressional authority over it. Indeed, by failing to substitute a new legislative authorization to either continue military action or force withdrawal, and by tacitly accepting the right of the Commander-in-Chief to act in any way he wishes, Congress has left the scope of its authority in even greater doubt than before.

In fact, however, neither President Johnson nor President Nixon has been willing to conduct war-making operations simply on the basis of the broad authority granted in the Tonkin Gulf Resolution. Lyndon Johnson thought the Tonkin Resolution was "desirable" but as he stated at a press conference on August 18, 1967:

"We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we're doing."⁵⁴

In the 1966 memorandum, the State Department contended that the SEATO Treaty was self-executing—that the President could independently commit troops to defend any SEATO signatory or protocol state under attack from communist forces if he deemed such action advisable.⁵⁵ But

51. *Id.* at 17.

52. The Tonkin Gulf Resolution was repealed by Pub. L. No. 91-672, § 12 (Jan. 12, 1971).

53. The Senate voted to repeal the Gulf of Tonkin Resolution on June 24, 1970, and reaffirmed that vote on July 10, 1970.

54. New York Times, Aug. 19, 1967, at 10, col. 1.

55. Meeker, *The Legality of United States Participation in the Defense of Viet-nam*, 54 DEP'T STATE BULL. 474, 484-85 (1966).

Secretary Rusk brought out a "something for everyone" shopping list of Vietnam justifications on January 28, 1966, when conceding that the SEATO treaty was not necessarily self-triggering. He stated:

I would not want to get into the question of whether, if we were not interested in the commitments, policy and principle under the South-east Asia Treaty, we have some legal way in order to avoid those commitments. I suppose that one could frame some argument which would make that case.

But it would seem to us that the policy, which was discussed and passed upon by the Executive and the Senate of that day, is that we are opposed to aggression against these countries in southeast Asia: both the members of the Organization and the protocol states.

In addition to that, we have bilateral assistance agreements to South Vietnam. We have had several actions of the Congress. We have had the annual aid appropriations in which the purposes of the aid have been

the SEATO Treaty—like the NATO Treaty, and all of our other collective security agreements—states that the United States shall meet aggression against one of its allies “in accordance with its *constitutional processes*.”⁵⁶ Even if this caveat were not included in the Treaty, it would be incorporated implicitly. For the Senate—which is the only House of Congress that approves a treaty—can hardly by-pass the constitutional requirement that both Houses of Congress declare war.

Above and beyond the Tonkin Gulf Resolution or any treaty commitments, successive administrations have professed to find, as some of the predecessors have, inherent powers of the Commander-in-Chief which have been taken to authorize military action almost anywhere in the world. In the same 1966 memorandum quoted previously, the Department of State referred to the constitutional responsibility of the Commander-in-Chief to “repel sudden attacks.”⁵⁷ The Department allowed that the “framers probably had in mind attacks upon the United States,” but that now, in a world grown smaller, “[a]n attack on a country far from our shores can impinge directly on the nation’s security.”⁵⁸ Under these conditions, according to the Department’s memorandum,

the Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.⁵⁹

V. THE STATE OF THE ISSUE TODAY

Recently, even more extended presidential powers have been discovered and proclaimed. On July 1, 1970, in an interview with Howard K. Smith, President Nixon seemed to extend the President’s presumed authority to defend American security on a global basis even further—to winning a “just peace”:

fully set out before the Congress. We have had special resolutions such as the one of August 1964, and we have had the most important policy declarations by successive Presidents with respect to the protection of South Vietnam against Communist aggression.

Hearings on S. 2793 Before the Senate Comm. on Foreign Relations, 89th Cong., 2d Sess., pt. 1, at 8 (1966).

Congress remains confused. At the end of a colloquy on repeal of the Tonkin Gulf Resolution between Senator Robert Dole and myself last June, the only thing that was clear was that the authority under which United States troops have been engaged and would remain engaged in Vietnam hostilities was unclear. *See generally* 116 CONG. REC. 18,970-82 (daily ed. June 23, 1970).

56. Southeast Asia Collective Defense Treaty, Sept. 8, 1954, art. IV, para. 1, art. IX, para. 2, [1955] 6 U.S.T. 81, T.I.A.S. No. 3170.

57. Meeker, *supra* note 55, at 484.

58. *Id.*

59. *Id.* at 485.

Mr. Smith. What justification do you have for keeping troops there other than protecting the troops that are there fighting?

The President. A very significant justification. It isn't just a case of seeing that the Americans are moved out in an orderly way. If that were the case we could move them out more quickly, but it is a case of moving American forces out in a way that we can at the same time win a just peace.⁶⁰

When fighting broke out in Jordan on September 17, 1970, Congress was in session. Although United States' intervention was a very real possibility, the President did not seek congressional authorization to act. The State Department, in a letter to me, reaffirmed its broad view of the President's inherent constitutional powers which would cover United States' action in Jordan:

As a general matter, the President must determine in a particular situation what action he believes necessary in behalf of the security interests of the United States and whether the pressure of events would permit him to take no action while the matter was submitted to Congress for its consideration.⁶¹

Somehow, in recent years, powers to ensure a "just peace" and unilaterally to define and protect "the security interests of the United States" wherever they may be threatened have been grafted to the constitutional authority of our Presidents as Commanders-in-Chief. If these claims are accepted, we also accept a major restructuring of the constitutional balance between Congress and the Executive, leaving Congress in the position of ratifying hostilities initiated unilaterally by the President or trying to stop them by cutting off funding, rather than making the precedent decision to authorize these hostilities.

In my view, both constitutional theory and the practical need for order at home and in the world require that these broad theories of unilateral presidential authority be rejected. At the very least, the revolutionary process by which the President has pre-empted Congress' constitutional duty to initiate war should be debated and either legitimated by constitutional change or rejected.

Some would argue that decades of congressional acquiescence plus Congress' poor performance during the Vietnam War constitute a persuasive case for *formally* restructuring the Constitution to give the President a broader, more unilateral war-making authority. I believe to the contrary that such a formal abdication of congressional authority should be opposed, as should further erosion of Congress' war-making role. The tragic presidential miscalculations on Vietnam—almost destroying that country while

60. *A Conversation With the President*, 63 DEP'T STATE BULL. 103-04 (1970).

61. Letter from U.S. Dept of State to Sen. Thomas Eagleton, Oct. 2, 1970.

seriously dividing this one—are an even more compelling argument for returning to the principles of collective judgment and deliberation. We do live in a smaller, more dangerous and rapidly changing world. But these factors, rather than diminishing the value of collective judgment, make it all the more important. While “declarations of war” may be anachronisms, the death, destruction, tragedy, and suffering of war remain ever-present realities. Congress can and must exercise collective judgment as to when and how we engage in hostilities.

VI. CONGRESSIONAL ACTION

Congress possesses the power to restore its role in the process of collective decision making on matters of war and peace, if only it possesses the will. As constitutional scholar Alexander Bickel has noted:

The “necessary-and-proper” clause of Article I of all the Constitution authorizes Congress, of course, to make “all laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .” The reference is to the previously enumerated powers of Congress. But there is another portion of the necessary-and-proper clause, not so often cited, which is one of the greatest consequence when it comes to issues of foreign policy and of war and peace. *The clause also charges Congress to make all laws which shall be necessary and proper for carrying into execution all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*⁶²

In 1970, during the second session of the 91st Congress, the House passed a feeble Joint Resolution which expressed the sense of Congress that “whenever feasible,” the President should seek appropriate congressional consultations before involving the Armed Forces of the United States in armed conflict, and should “continue such consultation periodically during such armed conflict.”⁶³ This vaguely worded effort fell far short of clarifying the war-making powers of the Congress and the President. On the Senate side, no hearings were held on the House Resolution or on a slightly better bill introduced by Senator Javits of New York.⁶⁴ In general, debate in the Senate has only touched the periphery of the constitutional questions involved, concentrating instead on the Cooper-Church and McGovern-Hatfield amendments dealing specifically with the Indochina War.

In 1971, in the first session of the 92nd Congress, eleven “war powers”

62. *Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess.—(1971).

63. H.R.J. Res. 1355, 91st Cong., 2d Sess. § 2 (1970).

64. S. 3964, 91st Cong., 2d Sess. (1970).

bills or resolutions were introduced in the House⁶⁵ and five in the Senate.⁶⁶ Senator Robert Taft of Ohio introduced a resolution⁶⁷ which, while vague as to the future delineation of congressional-Executive powers, was meritorious in its attempt to force Congress to face up to its responsibilities in Southeast Asia.

Senator Jacob Javits of New York, the first Senator to introduce "war powers" legislation and a leader in bringing the issue to the attention of Congress and the public, introduced a slightly improved version⁶⁸ of his original 1970 effort.

The Eagleton Resolution⁶⁹ was introduced on March 1, 1971. Senator John Stennis, Chairman of the Armed Services Committee, also introduced a resolution⁷⁰ along the general lines of the Eagleton proposal on May 11th and Senator Bentsen of Texas introduced essentially the Stennis Resolution in bill form on May 17th.⁷¹

Underlying all these efforts was the premise that more precise guidelines were necessary to restore the process of joint congressional and presidential decision-making before this country engages in hostilities abroad.⁷² These efforts recognized that the President must have sufficient discretion to take emergency action to meet attacks on the United States and its forces and to rescue American civilians under siege abroad.

These measures represented different approaches. After months of meetings among Senator Javits, Senator Stennis and me, a compromise bill was agreed upon, which can best be understood against the background of the five original proposals.

The following table illustrates the areas of agreement and disagreement among the original Senate proposals:

65. H.R. 8446, 92d Cong., 1st Sess. (1971); H.R. 4194, 92d Cong., 1st Sess. (1971); H.R.J. Res. 680, 92d Cong., 1st Sess. (1971); H.R.J. Res. 669, 92d Cong., 1st Sess. (1971); H.R.J. Res. 665, 92d Cong., 1st Sess. (1971); H.R.J. Res. 664, 92d Cong., 1st Sess. (1971); H.R.J. Res. 644, 92d Cong., 1st Sess. (1971); H.R.J. Res. 431, 92d Cong., 1st Sess. (1971); H.R.J. Res. 342, 92d Cong., 1st Sess. (1971); H.R.J. Res. 275, 91st Cong., 1st Sess. (1971); H.R.J. Res. 1, 92d Cong., 1st Sess. (1971).

66. S. 1880, 92d Cong., 1st Sess. (1971); S. 731, 92d Cong., 1st Sess. (1971); S.J. Res. 95, 92d Cong., 1st Sess. (1971); S.J. Res. 59, 92d Cong., 1st Sess. (1971); S.J. Res. 18, 92d Cong., 1st Sess. (1971).

67. S.J. Res. 18, 92d Cong., 1st Sess. (1971).

68. S. 731, 92d Cong., 1st Sess. (1971).

69. S.J. Res. 59, 92d Cong., 1st Sess. (1971). For the text of this joint resolution in its entirety, see APPENDIX No. 1.

70. S.J. Res. 95, 92d Cong., 1st Sess. (1971).

71. S. 1880, 92d Cong., 1st Sess. (1971).

72. Senator Javits stated the guiding principle behind these legislative efforts: The enumeration of Congressional war powers in the Constitution and the historical origins of the "declare" and "Commander in Chief" clauses testify that the constitutional framers intended to grant Congress the primary authority over the initiation of war and responsibility for the formulation of basic guidelines for the conduct of war.

117 CONG. REC. 2531 (daily ed. Mar. 5, 1971).

<i>Instances Where Pres. Can Act Without Specific Authorizing Congressional Action by Both Houses</i>	EAGLETON	JAVITS	TAFT	STENNIS BENTSEN
<i>Repel Attack on U.S.</i>	YES	YES	YES	YES
<i>Prevent an "Imminent" Attack on U.S., etc.</i>	NO (admits further debate is necessary)	NO	YES	YES
<i>Repel Attack on U.S. Troops</i>	YES, but limited to defensive action	YES	YES	YES
<i>Protect U.S. Citizens Abroad</i>	YES, but with restrictions	YES	Probably yes, but Section 4 is unclear	YES
<i>Protect U.S. Property Abroad</i>	NO	YES	Probably no, but Section 4 is unclear	NO
<i>Under Auspices of Treaties</i>	NO	Yes, but requires affirmative Congressional action w/in 30 days	Begs the question in Part 1, Section 2	UNCLEAR
<i>Under "National Commitments"</i>	NO	Yes, but requires affirmative Congressional action w/in 30 days	Probably yes, but Section 4 is unclear	NO
<i>Commit U.S. Troops Where Imminent Possibility of Involvement in Hostilities Exists</i>	NO	Yes, but not specific	YES	NO
<i>Commit U.S. Advisors to Accompany Foreign Troops in Combat</i>	NO	Yes, but not specific	YES	NO

The three most important areas of disagreement concerned the scope of the President's authority to commit troops to combat under "treaty commitments," to prevent an "imminent" nuclear attack and to deploy troops and advisors in situations where involvement in hostilities is a virtual certainty.

A. *Treaties*

All of our mutual defense treaties contain the caveat that each of the signators act "in accordance with their constitutional processes."⁷³ In this country, that means a collective decision must be reached by both Houses of Congress before United States' forces can be committed to trial by force, not by the President and the Senate through the use of the treaty power.

It seems clear that the President and the Senate, through the use of the treaty power, cannot legitimately "declare war." The concurrence of the House is required to authorize hostilities.⁷⁴ In fact, Madison noted that the possibility of giving the Senate alone the power to "declare war" was considered and rejected.⁷⁵

Even if treaties could require the use of armed force, however, none of our treaties currently in force requires an automatic response. Our most strongly worded commitment, the North Atlantic Treaty, states:

The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them . . . will assist the Party or Parties so attacked by taking . . . such action as it deems necessary, including the use of armed force⁷⁶

Under this language, the United States is not committed to an immediate or automatic response. As the Senate Foreign Relations Committee told the 81st Congress in its report on the NATO Treaty:

Would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack on New York City? In such an event does the treaty give the President the power to take any action without specific Congressional authorization which he could not take in the absence of the treaty? The answer to both of these questions is "No."⁷⁷

However, after re-reading murky presidential assertions on SEATO, it seems prudent rather than redundant to spell out that treaties do not authorize hostilities without further congressional action.

73. See, e.g., Southeast Asia Collective Defense Treaty, *supra* note 56, art. IV, para. 1, art. IX, para. 2.

74. Bickel goes one step further in arguing that a delegation that is too broad may result:

On the other hand, I think that a generalized, prospective delegation by Congress to the President of the Power to go to war in aid of our allies pursuant to treaty commitment gives away more of its own power than Congress may constitutionally give away by so broad a delegation—or at any rate, a delegation which it is possible to construe all too broadly.

Hearings on War Powers Legislation, *supra* note 62, at ____.

75. J. MADISON, *supra* note 10, at 475.

76. North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, T.I.A.S. No. 1964.

77. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON EX. L., NORTH ATLANTIC TREATY, 81st Cong., 1st Sess. 8 (1949).

The Stennis and Bentsen proposals were unclear on this point. The Taft Resolution dealt with deployment. The Eagleton Resolution specifically stated:

No treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further Congressional authorization.⁷⁸

However, the Javits bill not only failed to spell this out but, if enacted by both Houses, would have served as a functional equivalent of a predated—although limited—declaration of war. Under it, the Executive could have unilaterally engaged the United States in hostilities for up to 30 days in Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad-Tobago, Uruguay, Venezuela, Australia, France, New Zealand, Pakistan, the Philippines, Thailand, the United Kingdom, South Vietnam, Belgium, Canada, Denmark, Iceland, Italy, Luxembourg, the Netherlands, Portugal, Norway, Greece, Turkey, the Federal Republic of Germany, South Korea, Taiwan, and Japan—all treaty signatories with the United States.⁷⁹

All of the Senate initiatives recognized the President's ability to fight a limited defensive war to protect American forces when they were legally stationed in a country with which the United States has a treaty commitment.

But what was at issue was whether the President should have unilateral authority to commit United States' troops to offensive hostilities under our far-reaching network of treaties. Three early Supreme Court decisions provide a solid underpinning for drawing the line between offensive and defensive war.⁸⁰

78. S.J. Res. 59, 92d Cong., 1st Sess. 2 (1971).

79. The following are the signatory countries to the Charter of the Organization of American States, Apr. 30, 1948, [1951] 2 U.S.T. 2394, T.I.A.S. No. 2361: Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad-Tobago, Uruguay, and Venezuela. The following are the signatory countries to the Southeast Asia Collective Defense Treaty, *supra* note 56: Australia, France, New Zealand, Pakistan, the Philippines, Thailand, and the United Kingdom. South Vietnam was designated a protocol state to the SEATO agreement. The following are the signatory countries to the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964: Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, and the United Kingdom.

A complete explanation of the commitments of the United States to the defense of foreign countries may be found in U.S. Dep't. of State, *United States Defense Commitment and Assurances*, August, 1967, in *Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 52-71 (1967).

80. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800). To the Court "the whole powers" of entering into an offensive war were vested in the Congress

B. *Pre-emptive Strikes*

Should the President be empowered to strike first if he deems the very existence of this country to be threatened by "imminent" nuclear attack?

The concept of executive power to act pre-emptively is not new. In fact, the Articles of Confederation contained the first and only explicit grant of power for a pre-emptive strike:

No state shall engage in any war without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted.⁸¹

However, a similar provision was omitted from the Constitution.

Justice Story again raised the possibility of executive pre-emptive powers when he stated:

the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.⁸²

In the nuclear world of 1972, the stakes are no longer isolated villages subject to attack by Indians. In a sane world dependent on the universal acceptance of mutual deterrence for its survival, a first strike should not be sanctioned. But no one can guarantee that some time, someday, a demented world leader will not attempt an irrational nuclear attack on the United States. This remote possibility may be reason enough to justify an explicit grant of power to the President to act unilaterally and pre-emptively.

The Taft, Stennis and Bentsen efforts sanctioned unilateral presidential action to prevent an "imminent" nuclear attack.⁸³ The Eagleton and Javits proposals did not. Perhaps, as Congress attempts to clearly define the war powers of the executive and legislative branches, it should also

"alone." Included in these powers was authority to declare either general or narrowly limited hostilities. Presidential authority to take offensive action under the guise of the Commander-in-Chief power arose only after Congress had acted. *Talbot v. Seeman*, *supra* at 27. Moreover, while the tactics of warfare might require that the President have certain discretionary powers, even these could be narrowed by precedent legislative action. *Little v. Barreme*, *supra* at 177-78.

81. ARTICLES OF CONFEDERATION art. VI.

82. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).

83. S.J. Res. 18, 92d Cong., 1st Sess. 2 (1971); S.J. Res. 95, 92d Cong., 1st Sess. 2 (1971); S. 1880, 92d Cong., 1st Sess. 2 (1971).

recognize that, in the final analysis, all any resolution can expect to achieve is to hold a President legally and politically accountable for his actions. But the consequences of nuclear holocaust make the questions of political and legal responsibility moot.

C. When Congress Must Act

In what circumstances and at what point must the President come to Congress for authorization to conduct military hostilities? Should the continuance of a secret air war or the deployment of American troops to world hot spots, or the assignment of American "advisors" to foreign troops on combat missions require affirmative congressional authorization?

The Eagleton, Stennis and Bentsen proposals specified when affirmative congressional action was necessary.⁸⁴ The Javits and Taft Resolutions contained no such provisions. Obviously, hostilities include land, air, or naval action taken by the Armed Forces of the United States against other armed forces or the civilian population of any other nation. But the Eagleton, Stennis and Bentsen efforts were more specific. They included the deployment of American forces outside the United States under circumstances where an imminent involvement in combat activities was a reasonable possibility. They also included the assignment of United States' soldiers to "accompany, command, coordinate, or participate in the movement of regular or irregular armed forces of any foreign country when such foreign armed forces are engaged in any form of combat activity."⁸⁵

There is well-founded precedent for such limitations. In the absence of limiting congressional legislation, presidential power to move Armed Forces of the United States in international waters and to station them on territory of our allies has generally been accepted, except where such action could reasonably be expected to lead to hostilities. Only once has this principle been flagrantly abused. In 1846, after the annexation of Texas, President James Polk ordered American troops to enter the disputed territory between the Nueces and Rio Grande Rivers. Hostilities immediately broke out and Congress thereafter declared war against Mexico. However, some 18 months later, the House of Representatives concluded that the President had unconstitutionally begun the war and, in effect, Polk was justly censured.⁸⁶

The Eagleton, Stennis and Bentsen proposals were based on the view that presidential power to move the Armed Forces of the United States did not, and should not, extend to placing American men in situations where combat is almost inevitable. Further, as Vietnam has illustrated, these three proposals recognize that military advisors to countries where

84. S.J. Res. 59, 92d Cong., 1st Sess. 6 (1971); S.J. Res. 95, 92d Cong., 1st Sess. 3 (1971); S. 1880, 92d Cong., 1st Sess. 3-4 (1971).

85. S.J. Res. 59, 92d Cong., 1st Sess. 7 (1971). See also S.J. Res. 95, 92d Cong., 1st Sess. 6 (1971); S. 1880, 92d Cong., 1st Sess. 5 (1971).

86. CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848).

combat activities are in progress or could be expected to commence shortly are becoming increasingly more dangerous in an era of "brush-fire" wars and guerrilla warfare.

VII. CONCLUSION

During 1971, war powers legislation moved forward. Hearings began on March 8, 1971 and continued until October 6, 1971. Twenty-four witnesses were heard: constitutional historians and lawyers, spokesmen for the executive and legislative branches and former administration officials.⁸⁷

After the initial round of hearings, Senator Javits and I, in an effort to put forth the best proposal and gain the most congressional support, began to work on a compromise proposal. After months of talking, an understanding on a compromise bill was reached. Senator Stennis, a leading Southern conservative, was kept abreast of developments, and on December 6th—one day before the Senate Foreign Relations Committee was to meet in executive session to report a war powers bill to the Senate—he agreed to co-sponsor the Javits-Eagleton compromise, along with Senator Spong of Virginia.

With only minor changes, the Committee reported out the Javits-Eagleton-Stennis-Spong compromise, a bill which Senator Bentsen of Texas also co-sponsored.

Specifically, regarding treaties, pre-emptive strike, and necessity for prior congressional approval for unilateral presidential action, the Javits-Eagleton-Stennis-Spong bill states:

87. The following is a list of witnesses that appeared before the Senate Foreign Relations Committee's hearings on war powers:

March 8, 1971	Henry Steele Commager
March 9, 1971	Richard Morris
	Alfred Kelley
March 24, 1971	Thomas Eagleton
	Claiborne Pell
	Jacob Javits
March 25, 1971	Thomas Mason
	Robert Taft
	Charles Mathias
	Paul Findley
April 23, 1971	Barry Goldwater
	Frank Horton
April 26, 1971	McGeorge Bundy
	George Reedy
	John N. Moore
May 14, 1971	William P. Rogers
July 26, 1971	Alexander Bickel
July 27, 1971	Lloyd Bentsen
	Thomas Eagleton
	George Ball
	William D. Rogers
October 6, 1971	William Spong
	John Stennis
	Lawton Chiles
	Arthur Goldberg

Treaties:

[A]uthority to introduce the Armed Forces of the United States in hostilities or in any such situation (where imminent involvement in hostilities is clearly indicated by the circumstances) shall not be inferred . . . from any treaty hereafter ratified unless such treaty is implemented by legislation specifically exempting the introduction of . . . such Armed Forces from compliance with the provisions of this Act. . . . No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities or in any such situation. . . .

Pre-emptive strike:

In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—

(1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; *and to forestall the direct and imminent threat of such an attack; . . .*

Necessity of prior congressional approval:

Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such Armed Forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.⁸⁸

This bill will be debated on the floor sometime during the life of the second session of the 92nd Congress. Passage of a strong war powers bill is important in practical terms because it will provide political guidelines by which future Congresses can decide how and when to go to war. Congress will be assured of being involved, as the Constitution mandates, in the life and death decisions which face a democracy on the brink of war. Just as importantly, such legislation would provide the "judicially discoverable and manageable standards," which many courts have been unable to discover or manage with regard to the legality and constitutionality of the Vietnam War.

A war powers bill will not serve as an absolute guarantee against the occurrence of non-authorized hostilities in the future. The Indochina War might have occurred even if the guidelines for war powers responsibility

88. S. 2976, 92d Cong., 2d Sess. (1972) (emphasis added). For the text of this bill in its entirety, see APPENDIX NO. 2.

had been clearly defined. Any legislation can be violated by a Chief Executive who chooses to do so, regardless of how clear and precise its terms.

In addition, no resolution can force Congress to act responsibly. It is clear that presidential decisions shaped the course of the Indochina war and that an indifferent Congress provided little or no restraint on executive actions. Some politicians will continue to prefer unclear guidelines, especially in an area as crucial as deciding whether to send American sons to war; for scapegoats are often popular in politics and the assumption of responsibility often is not.

These are problems that exist with many of the institutional devices we have developed in an effort to make the government operate in an orderly fashion. Good faith cannot be legislated. But clear criteria can be set forth within which men of good faith can and will operate.⁸⁹

89. As one of the first members of the Supreme Court, Mr. Justice Iredell, noted:

All systems of government suppose they are to be administered by men of common sense and common honesty. In our country, as all ultimately depends on the voice of the people, they have it in their power, and it is to be presumed they generally will choose men of this description: but if they will not, the case to be sure, is without remedy. If they choose fools, they will have foolish laws. If they choose knaves, they will have knavish ones.

Case of Fries, 9 F. Cas. 826, 836 (No. 5126) (C.C.D. Pa. 1799).

APPENDIX No. 1

SENATE JOINT RESOLUTION No. 59

92d Congress, 2d Session

JOINT RESOLUTION

Regarding the powers of the Congress and the President to commit the Armed Forces of the United States to hostilities.

Whereas the framers of the Constitution of the United States intended the separation of powers doctrine to apply to the initiation of hostilities as a means for insuring collective judgment, whenever possible, before the Armed Forces of the United States were committed to such hostilities; and

Whereas the power to declare war was assigned to the Congress and this power authorizes the Congress to initiate, define, and limit the scope of hostilities involving the Armed Forces of the United States; and

Whereas the power to make rules regulating and governing the Armed Forces of the United States was assigned to the Congress, and this power authorizes the Congress to enact laws respecting the raising and use of such Armed Forces including their deployment in any foreign country; and

Whereas the power to appropriate moneys to support the Armed Forces of the United States was also assigned to the Congress, and this power authorizes the Congress to allocate funds so as to circumscribe the overall scope of hostilities and the uses of the Armed Forces of the United States; and

Whereas the Commander in Chief and Chief Executive powers were assigned to the President and these powers authorize the President to conduct hostilities initiated by the Congress and to respond to, and repel, attacks on the United States (including its territories and possessions), its Armed Forces, and, under certain circumstances, to rescue endangered citizens of the United States located in foreign countries: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That:

SECTION 1. Except as authorized in section 2 or section 3 of this resolution, the President shall not commit the Armed Forces of the United States to hostilities. No treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further Congressional authorization. It is specifically recognized that such treaties as the Charter of the United Nations, the North Atlantic Treaty, and the Southeast Asia Collective Defense Treaty do not authorize or require the President to commit the Armed Forces of the United States to engage in hostilities without a further authorization from both the Senate and the House of Representatives.

Sec. 2. The President may commit the Armed Forces of the United States to hostilities to the extent authorized by Congress through a declaration of war, statute, or joint resolution, but authorization to commit the Armed Forces of the United States to hostilities may not be inferred from legislative enactments, including appropriation bills, which do not specifically include such authorization. The Congress recognizes that during such authorized hostilities against an enemy country or enemy forces, the President's powers as Commander in Chief and Chief Executive provide him with the further authority, regardless of the limitations contained in the specific declaration of war or other authorizing statute or resolution, to order the Armed Forces of the United States to deliberately enter, invade, or intrude upon the territory or airspace of a country with which the United States is not then engaged in hostilities:

(a) when in hot pursuit of fleeing enemy forces who have attacked, or engaged in battle with, the Armed Forces of the United States and then retreated to the territory or airspace of such country, to the extent necessary to repel such attack or complete such battle, or

(b) when a clear and present danger exists of an imminent attack on the

United States or the Armed Forces of the United States by enemy troops located in such country, to the extent necessary to eliminate such danger.

SEC. 3. In the absence of a governing congressional authorization described in section 2, the President may commit the Armed Forces of the United States to hostilities, to the extent reasonably necessary to:

(a) repel an attack on the United States by military forces with whom the United States is not engaged in hostilities at the time of such attack and to eliminate or reduce the effectiveness of any future attacks by such military forces which are committing the attack being repelled; and

(b) repel an attack on the Armed Forces of the United States by military forces with whom the United States is not engaged in hostilities at the time of such attack and concurrently to eliminate or reduce any clear and present danger of future attacks by the military forces which are committing the attack being repelled; and

(c) withdraw citizens of the United States, as rapidly as possible, from any country in which such citizens, there due to their own volition and with the express or tacit consent of the government of such country, are being subjected to an imminent threat to their lives, either sponsored by such government or beyond the power of such government to control: *Provided*, That the President shall make every effort to terminate such a threat without using the Armed Forces of the United States: *And provided further*, That the President shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States.

SEC. 4. The commitment of the Armed Forces of the United States to hostilities pursuant to section 3 of this resolution shall be reported promptly by the President to the Congress, together with a full account of the circumstances under which such hostilities were initiated, the estimated scope of such hostilities, and the consistency of such hostilities, with the provisions of section 3. The question of continuing or terminating any such hostilities shall be decided upon by the Congress as soon as possible and not more than thirty days from the day on which hostilities were initiated, under the following procedures:

(a) any bill or resolution, authorizing the continuance or termination of military hostilities if sponsored or cosponsored by one-third of the Members of the House of Congress in which it originates, shall be considered reported to the floor of such House no later than one day following its introduction, unless the Members of such House otherwise determine by yeas and nays; and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such committee within three days after it is referred to such committee, unless the Members of the House referring it to committee shall otherwise determine by yeas and nays; and

(b) any bill or resolution reported pursuant to subsection (a) of this section shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall otherwise determine by yeas and nays.

SEC. 5. In any case where the Armed Forces of the United States have been committed to authorized hostilities, the President shall, while such hostilities are in progress, report to the Congress periodically on the status of such hostilities, as well as on the estimated scope and length of such hostilities.

SEC. 6. For purposes of this resolution, the term "hostilities" includes land, air, or naval actions taken by the Armed Forces of the United States against other armed forces or the civilian population of any other nation, the deployment of the Armed Forces of the United States outside of the United States under circumstances where an imminent involvement in combat activities with other armed forces is a reasonable possibility, or the assignment of members of the Armed Forces of the United States to accompany, command, coordinate, or participate, in the movement of regular or irregular armed forces of any foreign country when such foreign armed forces are engaged in any form of combat activities.

SEC. 7. This resolution shall not apply to hostilities commenced before the enactment of the resolution.

APPENDIX No. 2

SENATE BILL No. 2956

92d Congress, 2d Session

A BILL

To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "War Powers Act".

PURPOSE AND POLICY

SEC. 2. It is the purpose of this Act to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the Armed Forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations after they have been introduced in hostilities or in such situations. Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof. At the same time, this Act is not intended to encroach upon the recognized powers of the President, as Commander in Chief and Chief Executive, to conduct hostilities authorized by the Congress, to respond to attacks or the imminent threat of attacks upon the United States, including its territories and possessions, to repel attacks or forestall the imminent threat of attacks against the Armed Forces of the United States, and, under proper circumstances, to rescue endangered citizens and nationals of the United States located in foreign countries.

EMERGENCY USE OF THE ARMED FORCES

SEC. 3. In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—

(1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;

(2) to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;

(3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country; or

(4) pursuant to specific statutory authorization, but authority to introduce the Armed Forces of the United States in hostilities or in any such situation shall not be inferred (A) from any provision of law hereafter enacted, including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of such Armed Forces in hostili-

ties or in such situation and specifically exempts the introduction of such Armed Forces from compliance with the provisions of this Act, or (B) from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the provisions of this Act. Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such Armed Forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities. No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities or in any such situation, within the meaning of this clause (4); and no provision of law in force at the time of the enactment of this Act shall be so construed unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in any such situation.

REPORTS

SEC. 4. The introduction of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act shall be reported promptly in writing by the President to the Speaker of the House of Representatives and the President of the Senate, together with a full account of the circumstances under which such Armed Forces were introduced in such hostilities or in such situation, the estimated scope of such hostilities or situation, and the consistency of the introduction of such forces in such hostilities or situation with the provisions of section 3 of this Act. Whenever Armed Forces of the United States are engaged in hostilities or in any such situation outside of the United States, its territories and possessions, the President shall, so long as such Armed Forces continue to be engaged in such hostilities or in such situation, report to the Congress periodically on the status of such hostilities or situation as well as the scope and expected duration of such hostilities or situation, but in no event shall he report to the Congress less often than every six months.

THIRTY-DAY AUTHORIZATION PERIOD

SEC. 5. The use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act shall not be sustained beyond thirty days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless the continued use thereof in such hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.

TERMINATION WITHIN THIRTY-DAY PERIOD

SEC. 6. The use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act may be terminated prior to the thirty-day period specified in section 5 of this Act by an Act or joint resolution of Congress.

CONGRESSIONAL PRIORITY PROVISIONS

SEC. 7. (a) Any bill or joint resolution authorizing a continuation of the use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act, or any bill or joint resolution terminating the use of Armed Forces of the United States in hostilities, as provided in section 6 of this Act, shall, if sponsored or co-sponsored by one-third of the Members of the House of Congress in which it is introduced, be considered reported to the floor of such House no later than one day following its introduc-

tion unless the Members of such House otherwise determine by yeas and nays. Any such bill or joint resolution, after having been passed by the House of Congress in which it originated, shall be considered reported to the floor of the other House of Congress within one day after it has been passed by the House in which it originated and sent to the other House, unless the Members of the other House shall otherwise determine by yeas and nays.

(b) Any bill or joint resolution reported to the floor pursuant to subsection (a) or when placed directly on the calendar shall immediately become the pending business of the House in which such bill or joint resolution is reported or placed directly on the calendar, and shall be voted upon within three days after it has been reported or placed directly on the calendar, as the case may be, unless such House shall otherwise determine by yeas and nays.

SEPARABILITY CLAUSE

SEC. 8. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE AND APPLICABILITY

SEC. 9. This Act shall take effect on the date of its enactment but shall not apply to hostilities in which the Armed Forces of the United States are involved on the effective date of this Act.